That, to my mind, is a misdirection. It is the duty of the court to consider the defence story which may produce one of three results, namely, that if the court is convinced of the truth of the accused's story or that it created a reasonable doubt as to guilt, then the court must acquit the accused person. Sometimes the defence story strengthens the prosecution case and in that case the court has to find the accused guilty. But it is not the duty of the accused person to prove his innocence, far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection. In my view, the learned magistrate overlooked the authorities on that point which are afforded by the case of *Goh Ah Yew* v. *Public Prosecutor* [2] and the case of *Abu Bakar* v. *R.*[3] where the comments made by the trial district judge in the latter case is almost similar to the present case. In that case the appellate court said that there is no duty cast upon the defence in a criminal case to call any evidence and no inference unfavourable to him can be drawn. There the learned trial district judge appeared to have drawn an unfavourable inference because the absent witness was not called by the defence. And so in this particular case. If the learned magistrate had not overlooked those two authorities I am sure he would not have misdirected himself on this point.

In the circumstances this appeal is allowed. The conviction and sentence are set aside, and the fine paid by the appellant is to be refunded to him.

Appeal allowed.

Solicitors: *Laycock & Ong.*

TIO CHEE CHUAN v. KHOO SIAK CHIEW & ORS.

[P.C. (Lord Guest, Lord Wilberforce, Lord Pearson) March 2, 1967]

[Privy Council Appeal No. 3 of 1966]

Contract — Service contract — Construction of — Termination of service — Whether justified by special circumstances.

Practice and Procedure — Parties to be sued — Whether respondents were proper — Points not taken in courts below.

The appellant's letter of appointment as a teacher at a salary of $310 per month, dated October 15, 1960, was for four years commencing on January 1, 1961, and expiring on December 31, 1964. The appellant received a letter, dated October 8, 1962, from the acting supervisor and chairman of the education sub-committee stating that his post as teacher at the Sandakan Chinese Secondary School would not be continued from January 8, 1963, and that in pursuance of the terms of his contract with the education sub-committee he was given three month's notice to leave the service. In an action in the High Court in Borneo the appellant claimed that he had been wrongfully dismissed and sought damages. Harley J. held that the appellant had been wrongfully dismissed and awarded damages at a sum equal to $330 a month from the date of his ceasing employment up to the date of judgment and a further $330 a month from that date until his re-employment or December 31, 1964, whichever should be the earlier. The Federal Court reversed that judgment and he appealed to the Judicial Committee of the Privy Council. The official translation of clause 4 of the contract was in the following terms: "The teachers and staff of the school must not during the validity of the agreement of appointment rescind the agreement of appointment except for very important matters. If, in case of special circumstances, release of or withdrawal from the appointment is necessary either party shall give three months' notice in advance". No reasons for the appellant's dismissal were given in the letter of October 8, 1962, but one Tan Tze Shun one of the respondents (respondents' only witness) had said in evidence "we could not keep the plaintiff at $330 anyway because we had too large a ratio of junior teachers". No further elucidation of this point was made in evidence or in argument. In the Federal Court this ground of dismissal was amplified in the judgment of Wylie C.J. by reference to Education (Central Education Fund) (Amendment) Rules, 1963 under which it became necessary to reduce the number of teachers so as not to jeopardise the grant-in-aid under the Rules.

Held: the respondents having failed to justify the appellant's dismissal in terms of clause 4 of the contract, the appeal should be allowed.

Observations on question whether the Board would entertain points not taken in court below.

PRIVY COUNCIL.

J. G. Le Quesne, Q.C. and *Mervyn Heald* for the appellant.

J, Lloyd-Eley for the respondents.

The judgment of their Lordships was delivered by,

Lord Guest: This appeal from the Federal Court of Malaysia concerns the construction of a single clause in a contract between the appellant and the management committee of Sandakan Chinese Secondary School, Sandakan. The appellant's letter of appointment at a salary of $310 per month, dated 15th October 1960 was for four years commencing on 1st January 1961 and expiring on 31st December 1964. The appellant received a letter, dated 8th October 1962 from the acting supervisor and chairman of the education sub-committee stating that his post as teacher at Sandakan Secondary School would not be continued from 8th January 1963 and that in pursuance of the terms of his contract with the education sub-committee he was given three months' notice to leave the service.

The official translation of clause 4 of the contract is in the following terms:

"The teachers and staff of the school must not during the validity of the agreement of appointment rescind the agreement of appointment except for very important matters. If, in case of special circumstances, release of or withdrawal from the appointment is necessary either party shall give three months' notice in advance."

In an action in the High Court in Borneo the appellant claimed that he had been wrongfully dismissed and claimed compensation. Harley J. held that the appellant had been wrongfully dismissed and awarded damages at

a sum equal to $330 a month from the date of his ceasing employment up to the date of judgment and a further $330 a month from that date until his re-employment or 31st December 1964 whichever should be the earlier. Upon an appeal to the Federal Court of Malaysia judgment was given allowing the appeal with costs.

Before referring to the evidence their Lordships desire to say that in their opinion the respondents' were correct in submitting that the trial judge was in error in his construction of clause 4 when he said:

"In my view the intention was not to widen, but more likely to restrict, the common law reasons for dismissal."

Indeed, counsel for the appellant did not support the judge's construction of the clause. He conceded that if there was satisfactory evidence of special circumstances necessitating the appellant's withdrawal from the appointment in terms of clause 4, the dismissal would be justified.

There was no dispute as to the terms of the contract or that the appellant had been dismissed. The only question was whether his dismissal was justified. In order to succeed the respondents must justify his dismissal in terms of the contract and if there is doubt as to the meaning of the clause, then, as it is the respondents' document, it must be construed against them.

No reasons for the appellant's dismissal were given in the letter of 8th October 1962, but Tan Tze Shu, one of the respondents and a member of the managing committee, gave evidence. In his evidence he adduced three grounds for the appellant's dismissal. First, he alleged that under the unified scheme it would be necessary to reduce the appellant's salary from what he had previously been paid and that although the new salary would be within his contract, the appellant was not prepared to carry on. The witness departed from this allegation in his cross-examination and there is a finding of fact by Harley J. adverse to this contention. Secondly, the witness alleged that the plaintiff was qualified only to teach in junior classes and that he refused to teach in senior classes. This ground could have no substance, as there was nothing in the appellant's contract stipulating that he should teach senior classes and in fact when he started the employment there were no senior classes in the school. No reliance was placed on this ground in the Federal Court or before the board.

Their Lordships now come to the only point of substance in the case. The witness Tan Tze Shun said in evidence "we could not keep plaintiff at $330 anyway because we had too large a ratio of junior teachers". No further elucidation of this point was made in evidence or in argument. There is only a finding of the trial judge to the effect that under the new scheme the school could only employ a limited ratio of junior middle class teachers. When the case reached the Federal Court this ground of dismissal was amplified in the judgment of Campbell Wylie, Chief Justice, Borneo, by a reference to Education Rules made under the Education Ordinance, 1961. Under the Education (Central Education Fund) Rules, 1961 grants-in-aid may be paid unconditionally for the general purposes of the school. Under rule 5 no grant-in-aid shall be paid from the fund unless the school is in the opinion of the director conducted in accordance with any written law and under rule 6 if in the opinion of the director a grant-in-aided school is not conducted in such a manner that if it were applying for a grant or grant-in-aid it would qualify under rule 5 the director may after notice in writing reduce or cancel the grant-in-aid. So far it would appear that on any view there were no special circumstances necessitating the respondents terminating the appellant's employment. But Wylie C.J. then referred to rule 5A which was introduced by the Education (Central Education Fund) (Amendment) Rules 1963. This rule is in the following terms:

"5A (1) The Director may direct, either generally or in particular case, the maximum number of teachers who may be employed in any grant-in-aided school.

(2) The Director may permit any school to employ teachers over and above any maximum laid down under sub-rule (1):

Provided that no grant may be paid towards the cost of the salary of such teacher."

In the opinion of Wylie C.J. it became necessary to reduce the number of teachers in the school in accordance with these regulations so as not to jeopardise the grant-in-aid.

Before turning to the opinion of the Chief Justice their Lordships would make two general observations about the rules. In the first place it is at least doubtful whether any of the rules applied to the Sandakan School. "School" is defined by rule 2 of the 1961 Rules as a "primary school". The Sandakan School is referred to throughout the pleadings by both parties as a "Chinese Secondary School". In the second place, the 1963 Rules did not come into force until 1st January 1963 more than two months after the appellant was dismissed. Wylie C.J. thinks that the new rules must have been contemplated when the notice of dismissal was given and it is to be inferred that it was given as a result of that change. This is in their Lordships' opinion pure speculation and there is no evidence to justify such an inference. But however this may be, there is in the view of their Lordships no evidence that it became necessary to dismiss the appellant so as not to jeopardise the school's grant-in-aid. Evidence was completely lacking as to the view taken by the director as to the maximum number of

teachers to be employed in the school under rule 5A(1) and in any event the only result of employing an extra teacher would be under rule 5A(2) the loss of the grant towards the cost of the salary of such teacher.

In these circumstances there could be no question of rules 5 or 6 of the 1961 Rules applying so as to jeopardise the whole of the grant-in-aid. Some reliance was placed by the respondents' counsel on the trial judge's finding that the school could only employ a limited number of junior middle class teachers and the reference in a letter from the chairman of the education committee to the appellant, dated 10th October 1962 to the school "being limited by the quota of teachers". But these statements are quite unspecific and do not show in any way why it became necessary to dismiss the appellant.

In their Lordships' opinion the respondents have failed to justify the appellant's dismissal in terms of clause 4 of the contract. In the result the appeal succeeds upon this point.

There was a procedural point as to the defendant parties taken in the courts below which was but faintly argued before the board. In the first instance the proceedings were directed against "the educational sub-committee, the Chinese Chamber of Commerce, Sandakan" and three individuals as signatories to the letter of dismissal to the appellant. A preliminary point was taken before the judge that as the education sub-committee was an unincorporated body they could not be sued as such. In response to an order of the judge an application to amend the proceedings was made so as to make 12 individuals defendants as members of the management committee. Two of these defendants were ultimately struck out and upon this being done and no objection being taken by the defendants' counsel the court on 26th February 1964 granted the application to substitute the present defendants. The point was not further referred to in evidence and in their Lordships' opinion it is now too late for the respondents to raise any question as to whether they are the proper parties to be sued. Upon the information before the board there is in any case no substance in the point.

Their Lordships will report to the Head of Malaysia their opinion that the appeal should be allowed, the order of the Federal Court of Malaysia, dated 8th October 1964 set aside and the order of Harley J. in the High Court in Borneo, dated 14th May 1964 restored and that the respondents should pay the appellant's costs in the Federal Court and of this appeal.

Appeal allowed.

Solicitors: *Coward, Chance & Co.; Kingsley & Co.*

KHOO AH YEOW v. THE OVERSEAS UNION BANK LTD.

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and Yong J.) March 2, 1967]

[Penang — Federal Court Civil Appeal No. X.14 of 1966]

Practice and Procedure — Appeal — Appeal from the decision of Rent Assessment Board to High Court and appeal from High Court to Federal Court — Points not pleaded or argued before the High Court cannot be urged before the Federal Court.

A party ought not to be allowed to be harrassed by a superior court on a point which either was never raised or deliberately abandoned in the court below although exceptional circumstances may justify a departure from this rule.

In this case as the appellants questioned the decision of the Rent Assessment Board on matters though raised before the board were not pleaded or argued before the High Court the appeal should be dismissed as no exceptional circumstances existed in this case.

[Editorial Note: on "Points not taken in court below" see *Mallal's* Supreme Court Practice vol. I p. 917.]

Cases referred to:—

(1) *Tay Yew Heng* v. *Lee Thean Lai* [1959] M.L.J. 78.

(2) *Banbury* v. *Bank of Montreal* [1918] A.C. 626.

(3) *North Staffordshire Rly. Co.* v. *Edge* [1920] A.C. 254, 269.

(4) *Smith* v. *Caswell Laird & Co.* [1938] 2 K.B. 700, 725.

(5) *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473, 480.

(6) *Southerland* v. *Thomson* [1906] A.C. 51, 55.

(7) *Hoong Chin Wah* v. *Cheah Kum Swee & Anor.* [1967] 1 M.L.J. 163.

(8) *Ghulam Sarwar & Anor.* v. *Nayaz Ali & Ors.* A.I.R. 1921 Oudh 41.

(9) *Kalyan Das* v. *Maqbul Ahmad* I.L.R. 40 All. 497; A.I.R. 1918 P.C. 53.

FEDERAL COURT.

Lim Kean Siew for the appellant.

C. O. Lim for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Penang, dismissing the appeal of the appellant hereinafter referred to as Khoo, against the decision of the Penang Rent Assessment Board.

Khoo at the relevant date was a tenant of the premises known as No. 365 Penang Road, the property of the Overseas Union Bank Ltd., hereinafter referred to as the bank.

On 12th March, 1963, the bank applied to the board for the recovery of the said premises on the ground that it intended to demolish the premises and on the same site to rebuild a four storey building comprising of a shop and flats, under paragraph (m) of sub-section (1) of section 12 of the Control of Rent Ordinance, 1956.

The bank had served on Khoo a notice to quit on 30th August, 1962.

The bank maintained that the erection of